IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-855

WARNER-LAMBERT COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LIONEL KESTENBAUM
JAMES H. KELLEY
DONALD L. HARDISON
LARRY D. SHARP
Attorneys for Petitioner

Of Counsel:

BERGSON, BORKLAND,
MARGOLIS & ADLER
11 Dupont Circle, N.W.
Washington, D.C. 20036

March 13, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-855

WARNER-LAMBERT COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The Federal Trade Commission, in its Brief in Opposition, has simply refused to meet the important constitutional and statutory questions presented by this case. The "Questions Presented" do not even mention the First Amendment (Br. in Opp. 2); the First Amendment issues raised by this Court's seminal decision in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), are not reached until page 15; the Commission's novel corrective advertising order is remolded to appear as merely a conventional order to cease and

desist from "continued 'use' of past deception" (*id.* at 10); and the legislative history is waved aside as "simply irrelevant" to the question whether Congress intended to authorize a corrective advertising remedy (*id.*).

These diversionary tactics should not be allowed to obscure the fact that this is a case "of first impression" (*id.* at 8) which presents constitutional and statutory issues of great importance to the Commission's enforcement of the Federal Trade Commission Act in the field of advertising.[1] The central question raised is whether that Act and the First Amendment permit the Commission to condition future truthful advertising on the use of a mandated "corrective" message espousing the Commission's view of "the truth." This question was not reached in *Virginia State Board* and other recent commercial speech cases, and this Court's guidance, both for the Commission and all advertisers, is vitally needed.

ARGUMENT

I

Seeking to avoid the constitutional and statutory difficulties presented by its corrective advertising order, the Commission portrays the order as one prohibiting future unfair commercial conduct. Thus, the

[1] Judges Wright and Bazelon wrote a detailed Supplemental Opinion on Petition for Rehearing "[b]ecause of the importance of the [First Amendment] issues raised . . ." (Pet. App. 87a); and Judges Tamm, MacKinnon and Robb would have granted petitioner's suggestion for rehearing en banc (Pet. App. 96a). For a recent article discussing the impact of this Court's recent commercial speech cases on Commission regulation of advertising, *see* Elman, *The New Constitutional Right to Advertise*, 64 A.B.A. Journal 206 (1978).

Commission argues that its " 'cease and desist' powers . . . authorize it to require corrective statements in future advertising . . . where capitalization on the lingering beliefs about Listerine would constitute renewed deception" (Br. in Opp. 9), and that it "was proper for the Commission to conclude that future advertisements and sales of Listerine without a disclaimer amount to a continued 'use' of past deception" (*id.* at 10).

These strained characterizations are clearly designed to cast the Commission's order in a conventional cease and desist mold. In fact, that order is not concerned with enjoining future "capitalization" on continued use of deceptive practices,[2] and the court of appeals did not view it as such or sustain it on that basis.[3] At issue here is an order which, by its terms, compels Warner-Lambert to adopt and espouse the Commission's view on the efficacy of Listerine for symptomatic relief of colds and which conditions future truthful advertising on use of the corrective message mandated

[2] The complaint did not charge that sales of Listerine on the basis of "erroneous beliefs engendered by the prior false and misleading advertising" (Br. in Opp. 8) was an unfair method of competition, and the proceeding below did not deal with that issue in general or attempt to establish in any precise fashion the extent to which Listerine sales were, in fact, the result of prior cold relief claims. Indeed, the Commission's argument that petitioner will capitalize on erroneous consumer belief is at best extravagant. The record shows that the principal motivating factor in the purchase of a mouthwash is its effectiveness as a breath freshener, an attribute of Listerine not challenged by the Commission. (J.A. 2792)

[3] To the contrary, as discussed in the Petition (pp. 16-18), the court of appeals, seeking to bring this case within footnote 24 of *Virginia State Board*, erroneously concluded that "Listerine's current advertising, if not accompanied by a corrective message, would itself continue to mislead the public." (Pet. App. 91a) The Brief in Opposition makes no serious effort to support this aspect of the court of appeals' ruling.

by the Commission. The case thus bristles with First Amendment significance and with novel issues as to the scope of the Commission's remedial powers.[4]

II

The Commission acknowledges that this Court's recent cases have held that "commercial speech is protected by the First Amendment," but argues that First Amendment "protection is not unqualified." (Br. in Opp. at 15) Thus, the application of First Amendment protection to advertising is conceded, although the *limits* of such protection remain uncharted. As recently observed in *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 98 (1977), this Court left "for another day" the constitutional questions raised by "[l]aws dealing with false or misleading signs, and laws requiring such signs to 'appear in such a form, or include such additional information . . . as [is] necessary to prevent [their] being deceptive,'" (Court's paraphrase of footnote 24 in *Virginia State Board*). Those constitutional questions are squarely presented by the Commission's espousal of corrective advertising.[5]

---

[4] The Commission's reliance on cases upholding broad FTC powers "to overcome past misconduct" without considering First Amendment implications (Br. in Opp. 9) is misplaced. As former Commissioner Elman stated, "advertisers are now in a different situation: there is no constitutional right to fix prices, but there is a constitutional right to advertise truthfully." Elman, *supra* note 1, at 209.

[5] Under the rule that, where possible, this Court will interpret statutes to avoid holding them unconstitutional, Ullmann v. United States, 350 U.S. 422, 432-33 (1956), this Court will have occasion to address the First Amendment implications of corrective advertising as part of its consideration of whether the Commission's "cease and desist" authority encompasses that remedy.

Throughout its Brief in Opposition, the Commission relies on an Orwellian assumption of governmental infallibility that is flatly contradictory to our First Amendment traditions. Thus, the Commission argues that "contentions about matters of scientific fact are susceptible of proof or disproof" (*id.* at 12); that "questions about truth and falsity can be resolved objectively" (*id.* at 15); and that "the truth need not lie dormant, and the Commission properly required Warner-Lambert effectively to retract the falsehood of its prior advertisements . . ." (*id.* at 16).

On the basis of these and like assertions, the Commission urges that no significant First Amendment question is presented by an order that prohibits future truthful advertising unless it carries a "corrective" statement adopting the Commission's position in an ongoing scientific controversy. The Commission, having "objectively" determined "the truth," the First Amendment, it is argued, no longer applies. We respectfully submit that this is a highly debatable proposition and one on which plenary consideration by this Court is urgently required. Such consideration is particularly appropriate here in light of the conflicting scientific evidence before the Commission (*see* Pet. 11 n. 11) and the sharp disagreement between the Food and Drug Administration's advisory panel of medical and scientific experts and the lawyer-members of the Commission.[6]

---

[6] Both the Brief in Opposition and the court of appeals have seriously mischaracterized the nature and substance of the findings of the Food and Drug Administration Advisory Review Panel on Over-The-Counter (OTC) Cold, Cough, Allergy, Bronchodilator and Anti-Asthmatic Products. *First,* the Panel Report is the final action of the panel of experts. While it is true that the report "has not been adopted by the Commissioner of the Food and Drug

While full development of the point is beyond the scope of this Reply, there is a crucial distinction between, on the one hand, recognizing the Commission's authority to find that an advertisement is "false and misleading" in violation of Section 5 of the Act and, on the other hand, conferring upon the Commission the power to determine "scientifically" and "objectively" that one point of view in an ongoing and genu-

---

Administration" (Br. in Opp. 18), the Commissioner, when releasing the Panel Report for public comment, acknowledged that it "represents the best scientific judgment of the members." 41 Fed. Reg. 38312 (1976). After public comment, the Commissioner is to issue a final monograph. 41 Fed. Reg. 38312-14. *Second*, the statement that the panel's conclusion "is not based on any evidence that Warner-Lambert has not already presented to the Commission" is flatly wrong. A review of the portions of the panel's report pertinent to the active ingredients in Listerine, 41 Fed. Reg. 38347-54, 38408-14, shows that the panel had access to relevant evidence from other manufacturers that was not available to Warner-Lambert at trial. *Finally*, both the Commission and the court of appeals have suggested that Warner-Lambert has misrepresented the results of the panel's consideration of Listerine. That is absolutely unfounded. As a first step, the expert panel found that the St. Barnabas Study demonstrated that Listerine provides an "overall alleviation of symptoms" and, more particularly, that Listerine users experience "milder nasal symptoms and cough symptoms." 41 Fed. Reg. 38348, 38351, 38353, 38409, 38411, 38413. Because Listerine, itself, was tested, and not its individual ingredients, "the results did not demonstrate the contribution of [each individual] component to the overall alleviation of symptoms." *Id.* While the panel did conclude, as the Commission and court of appeals quoted, that "there are no well controlled studies documenting the effectiveness of" the individual ingredients, this does not detract from the panel's conclusion that the study demonstrated the effectiveness of Listerine's combination of essential oils itself. Under the "Principles Applicable to Combination Products", 41 Fed. Reg. 38322-28, Listerine's combination of essential oils was placed in Category III because additional study was needed to determine the necessity for, contribution of, and appropriate dose for each of the active ingredients. 41 Fed. Reg. 38328.

ine scientific dispute is, for all purposes, "the truth." Although the question is not free of doubt, we assume that in carrying out its statutory function the Commission may weigh conflicting scientific evidence and decide that in the existing state of medical knowledge, certain therapeutic claims are "false and misleading." In reaching that decision, the Commission has determined what might be called a "pragmatic" or "administrative" truth. That, however, is far different from saying the Commission has established *objective* and *scientific* truth with such certitude that it may compel a party to assert the Commission's view as if it were absolutely and incontrovertibly "*the* truth." As Justice Holmes observed in an essay criticizing assumptions of omniscience held by exponents of natural law, "Certitude is not the test of certainty. We have been cock-sure of many things that were not so." Holmes, *Natural Law*, 32 Har. L.Rev. 40 (1918).[7]

---

[7] We do not believe that a party may *ever* be constitutionally ordered to incorporate the Commission's version of "the truth" in future truthful advertising; if, however, such an order were to be upheld, we submit that it should be permitted only upon a specific finding that the opposing view is without any reasonable scientific basis. That standard, which was not met in this case (Pet. 11 n. 11, 13a-16a; Br. in Opp. 12-13), approximates the standard established in fraud cases under the postal statutes. In those cases, while "informed medical judgment" will prevail over "medical witnesses . . . who blindly adhere to a curative technique thoroughly discredited by reliable scientific experience," postal fraud orders will not issue "when the charges concern medical practices in fields where knowledge has not been crystallized in the crucible of experience." Reilly v. Pinkus, 338 U.S. 269, 274 (1949). On the basis of the medical evidence presented in this record (Pet. 11 n. 11) and the findings of the FDA's panel of medical and scientific experts (see Pet. 22 and note 6 *supra*), it is clear that there has been no definitive scientific determination opposed to Listerine's efficacy.

Thus, the important First Amendment questions left "for another day" in *Virginia State Board* and *Linmark Associates* are now before this Court, among them: To what extent do the FTC and other administrative agencies adjudicate objective truth? In what circumstances, if any, may the Government compel a party to adopt and assert as true a proposition still the subject of scientific debate?[8] When, if ever, may a party's future truthful advertising be conditioned upon appending a message stating the government's version of the truth? Does the purported justification for the corrective advertising order outweigh the infringement of First Amendment rights inherent in such an order?

III

Section 5(b) of the Federal Trade Commission Act, empowers the Commission, upon finding "that the method of competition or the act or practice in question is prohibited . . . , [to issue] an order requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice." 15 U.S.C. § 45(b). On its face, this authorizes orders to cease and desist from past acts, practices or methods of competition; nothing in the statutory language expressly authorizes an order requiring a party to correct "lingering beliefs" that may have resulted from past deceptions. In these circumstances, it is appropriate to refer to the legislative history. Contrary to the Commission's disdainful pronouncement, that

[8] As former Commissioner Elman observed, "The burden of justifying a restriction on speech rests on the government. And the right to speak includes the right not to be compelled to speak that which one does not believe." Elman, *supra* note 1, at 208-09.

history is far from being "simply irrelevant" to the question of the Commission's authority to order corrective advertising (Br. in Opp. 10).

While a full exposition of the pertinent congressional debates and reports would not be appropriate in this Reply, reference to a few brief excerpts will confirm the correctness of Judge Robb's conclusion that "corrective advertising is beyond the statutory authority of the . . . Commission." (Pet. App. 79a) In considering the legislative history, it is important to recognize that the concept of requiring corrective statements was well known in 1938 when Congress adopted the Wheeler-Lea Amendments to the Federal Trade Commission Act. Indeed, as early as 1929, Professor Handler had referred to a remedy used by Better Business Bureaus of "compelling the publication of retractions."[9] Nevertheless, in enacting the Wheeler-Lea Amendments, Congress made no change in the substance of the Commission's existing cease and desist authority, despite specific congressional recognition that "[e]ven after the order became effective, the false information . . . would still repose in the minds of . . . millions of persons. . . ." H.R. Rep. No. 1613, 75th Cong., 1st Sess. 26 (1937). Concerned with the "question of applying remedies to a definition very broad in its terms," 83 Cong. Rec. 392 (1938) (remarks of Rep. Lea), Congress was reluctant to impose unduly severe remedies.[10] Consequently, in the

[9] Handler, *False and Misleading Advertising*, 39 Yale L.J. 22, 46 (1929); *see also*, Handler, *Unfair Competition*, 21 Iowa L. Rev. 175, 196 (1936).

[10] *Accord:* Rep. Halleck, *id.* at 400-01; Rep. Woverton, *id.* at 396; H.R. Rep. No. 1613, 75th Cong., 1st Sess. 5 (1937).

words of Representative Lea, it determined that "the proper method is to give him [the advertiser] a chance to . . . adjust his conduct to the law where the article devised is not injurious and he does not act with intent to defraud or mislead," *id.* at 407. Professor Handler, a well-informed observer of the trade regulation scene, criticized Congress for not adopting stiffer remedies, specifically complaining that it had not vested the Commission with power to compel retractions "to dispel the misleading impressions created by the prior publication."[11] From that time on, the Commission did not claim the authority to impose an order requiring retraction of false advertising until urged to do so by Students Opposed to Unfair Practices (SOUP) in 1970;[12] and there was no express statutory authority

[11] Handler, *The Control of False Advertising Under the Wheeler-Lea Act*, 6 Law & Contemp. Prob. 91, 105-08, 109-10 (1939).

[12] *See* Anderson & Winer, *Corrective Advertising: The FTC's New Formula for Effective Relief*, 50 Texas L.Rev. 312, 312-16 (1972). SOUP's petition was denied, although the Commission majority claimed it had corrective advertising authority. This is the first litigated case to order corrective advertising. Earlier cases now relied on by the Commission (Br. in Opp. 11-12) did not involve the same kind of remedy the Commission has asserted here. As Judge Robb noted,

> "In those cases advertisements falsely represented that the products offered for sale were the same as the products, well-known to the public, which had been offered in the past. The Commission's orders simply required these false representations to be corrected in future advertisements using the same or similar format or copy. In the present case, however, when Warner-Lambert has ceased and desisted from advertising Listerine as a remedy for colds and sore throats there will be nothing to correct in the text of the Listerine advertisements. Any 'corrective statement' will relate solely to past advertising." (Pet. App. 85a-86a)

until Congress, in 1975, provided for corrective relief in cases involving bad faith.[13]

IV

Finally, systematically ignoring the significant conflicts in medical fact and opinion on the subject of Listerine's efficacy, the Commission states that petitioner does not dispute that the colds claims for Listerine were false and misleading (Br. in Opp. 8). This contention is erroneous. Petitioner at all times has disputed this conclusion, pointing out that it was contrary to the findings of the FDA's panel of cough-cold experts. Those findings were highly relevant both to the question of Section 5 violation and to the appropriateness of an order compelling petitioner to state as absolute truth a proposition (i.e., that Listerine is not effective in alleviating cold symptoms) which it in good faith does not believe and which the FDA expert panel has said is probably not correct. The court of appeals erred in upholding the Commission's refusal to reopen the record to consider the findings of the expert panel.

[13] *See* Pet. 24; Pet. App. 80a-81a. The significance of the 1975 legislation is in no way undercut by the Commission's argument that the 1975 legislation "did not affect in any way the Commission's power under existing statutes." (Br. in Opp. 10) As Judge Robb aptly noted, "The question before us is what is the 'existing power' of the Commission, and that question is not answered by either the amendment or the Committee's report." (Pet. App. 82a)

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

LIONEL KESTENBAUM
JAMES H. KELLEY
DONALD L. HARDISON
LARRY D. SHARP

Attorneys for Petitioner

Of Counsel:

BERGSON, BORKLAND,
MARGOLIS & ADLER
11 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 462-5930

March 13, 1978